

Gradual Transformation of Public Interest Theory and its Status in Iranian Constitution Law

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ABSTRACT. Public interest theory in governance and its reflection in Constitution Law are recently emerging in public law literature. Its concept and function differs country-by-country based on governing ideology of the society. Liberal states usually construe this theory by considering individual orientation and social states by society priority. The concept of public interest and the mechanism to achieve it in law and ethics philosophy in general and in Iranian Constitution in particular is a disputing discussion. We assume that any school construes public interest by its selected ideology in law philosophy and political theory. Likewise, by Iranian Constitution Law, it is perceived that respecting expediency especially “system expediency” has broad usage in governance especially upon revolution. Although respecting customary expediency does not seem so surprising.

1. INTRODUCTION

Since human life beginning, thinking about interest has been a radical pillar for decision making in different areas. Since human entered agricultural age to today as post-modern age, expediency and interest has been his/her single guidance in life. However, the emergence of this concept in governance and the mechanism to use it in society in well – devised manner are the products of intellectualism. It is since this era that government has been obliged to purvey the interests of its citizens and nationals.

Changes in the trends of states to treat citizens are the impacts and outcomes of democracy and government for people. Public interest flexible concept has caused in any speech and preach represented by politicians, parliament members and local authorities, this term is heard repeatedly. Almost in all governments, be mentioning public expediency, agents and decision makers claim that their behaviors and decision are toward supplying public interests. Although in most cases, public expediency is used to deceit public opinions, this idea can be an origination for many social transformations especially in lawmaking if it is manifested in the society rationally and logically.

In Iranian law especially in Constitution and under the effects of *Shi'a* jurists, “public expediency” has been more prevalent than “public interest”. In the first perception, it seems that “expediency” is a different concept to “interest” since the usual attitude toward public interest theory is that the state decides on administrative affairs by a material and customary perception on pure national interests. But public expediency that seen more in ideological political systems, would have other measures for interests preference, since in religious political systems, the existence of some predetermined norms are the most factor of limitations for customary expedencies.

The concept of public interest and its transformation and whether current structure of Iranian Constitution Law enjoys needed capacities to pose and execute public interest theory or not, are, inter alia, the most important questions which present paper attempts to respond.

2. PUBLIC INTEREST THEORY

One can say that government function is remained mostly fixed over history. Overall, the main act of government has been always to survive and to promote wellness of the state and its nationals. It

can be seen in this famous statement: “*salus populi superma lex esto*¹”. Authors in both ancient and modern times have concurred that the radical function of the state is people’s wellness. Some believe that the reputation of such thinking is due to its ambiguous meaning (Loughlin, 2009). Recognizing the basics of this theory and expressing the ideas of scientists in this regard is the first step to achieve a common point.

a. PUBLIC INTEREST, DEMOCRACY PUZZLE

Public interest in laws and political science as “government for people” has become as basis for democracy. Since public interest like many other concepts in general law is a function of time and temporal conditions, it is studied by more or less contradictory analyses. What is the concept of public interest? What affairs does it involve? Who is the authority to decide? Or by the excuse of public expediency, how far one can limit individual liberties? There are issues that according to Andrew Hued have changed above theory to democracy puzzle (Heywood, 2004).

• Democracy, founder of theory

The trial of democracy should be looked for in ancient Greece. Like many other terms, it is also ended to cracy (*kratos*) which means power or governance. In ancient Greece, “demo” means “people”. Therefore, democracy means people’s governance (Heywood, 2004) that has passed a fall and down fate till today.

In 18th century, Abraham Lincoln appreciated “people’s government over people for people” in Gettysburg Address. He believed that “government for people” which is special for modern age should be practiced so that in administrative decision making, the only benchmark is public profit. In his most important work “capitalism, socialism and democracy”, Peter Schumpeter asserts: “democratic method is the discipline of an entity to achieve political decisions which yield to public wellness by encouraging people to decide on their problems through selecting individuals who should gather to realize its will” (Schumpeter, 1975). According to this opinion and especially in interpretations on democracy in modern age, the role and status of states would change. The aim of the state which its art was only to obtain taxes and running armies that assigned people’s interests supply to them is today public interests purvey.

Upon transition for this step and determining government aim, the main question is the mechanism to purvey public interests. A great challenge is how to achieve such holy ideal. What appeared more is the dispersion of verdicts in this regard. However, such dispersion is not due to the fact that some may not select common interest; rather, it is emanated from this reality that in the opinion of different groups and individuals, public interest would have different meanings (Schumpeter, 1975).

b. PUBLIC INTEREST IN LIBERALISM

Recognizing the concept of interest and how to realize it in liberal schools needs to study its metaphysical and ontological foundations. The metaphysical and ontological nexus of liberalism rests on individualism (Panahi, 2011). Despite of all disagreements among scientists, such individualism would finally lead into individual interest and expediency. On the other hand, the main point in the concept of expediency which has made it attractive for liberalists is that it is indifferent to ethical origination and only pays attention to facilities (Barry, 1992).

• Bentham

In his book “an introduction on ethics and lawmaking principles” Bentham writes: “human is an entity governed by enjoyment and pain so that all his actions are determined by a conflict between these two principles. Any human either the poorest or the richest ones know the meaning of pain

¹ The wellness of people should be superior law.

and enjoyment and it needs no philosophical argument (Bentham, 1970). According to him, happiness is the main determinant in laws and ethics. He believed that access to public interest is possible when the heist profits are prepared for society's members. In fact, it is a mechanical measure to achieve common wellness.

- **John Stewart Mill: Social Utilitarianism**

Although liberal utilitarianism started by Bentham's works, its splendor owes to John Stewart Mill (1806 – 1872). He felt that Bentham's interpretation on utilitarianism is so that some criticisms by philosophers to utilitarianism seem right. In his book "utilitarianism", Mill attempts to provide a new description of utility in which human values and ethical virtues have their own shares by retaining the principles and ideas of this school.

Although he accepts utility principle and prosperity uniqueness in enjoyment as a basis, he refuses Bentham's ideas on utility benchmark uniqueness to "intensity" and "length". In contrary, he enters enjoyment quality and such utilities as artistic creation into utilitarianism. According to Mill, "dissatisfied Socrates is better than a satisfied stupid person and unpleased human is better than a pleased pig" (Mill, 2009).

Mill attempts to make personal interest close to social interest. Thus, he is reputed as the pioneer of social utilitarianism (Movahed, 2005). How one can change from a selfish utilitarian to public interest is the question to which Mill provides several responses. First, utilitarianism would finally lead into common interest since social sense exists more or less in any relevant person. The feelings which shape utilitarian ethical commitment generating force can be with those ones who believe such ethics (Mill, 2009). However, Mill is aware that ethical commitment cannot finally lead into common interest. So he asserts that richer whole has more chance to supply individual enjoyments. Therefore, people accept social interest for more personal profit. Besides, training society's individuals would create condition in which people get closer from personal enjoyment to common interest. Question: how a person who looks for supplying collective interest, can be considered as utilitarian?

- **Criticisms Against Utilitarianism**

In Bentham's utilitarianism, the way of public interest is to aggregate personal interests. It rests on this assumption that there is no conflict between personal and social interests and they are in the same line. However, one can hardly accept this since Bentham respects the aggregation of individual interests not their implications. Of course, it can face with serious problems without a qualitative evaluation to determine public expediency properly (Rasekh, 2002). Besides, even if we ignore the conflict of individual and social interests, the problem of temporary nature and non-decisiveness of interests by people is still remained. Although Mill attempted late to make utilitarianism to social welfare by adding such elements like dignity, freedom, equality and justice, one should say that if it supposed that a selfish and utilitarian human thinks about the wellness of other people by training and obtaining human virtues, how can we still consider him as utilitarian?

c. WELFARE STATE

In late 19th century, liberalism confronted with two waves of crises in free market economy. In the first wave, the possibility of mass goods production and accumulation in the society has yielded to market instability and competition and tendency to merge companies and generating bigger economic firms were in capitalism agenda (Rahmatollahi, 2009). The aim of this operation was to control the market and controlling pricing system. Afterwards, hidden hands of Adam Smith could not come out of demand and supply to control market and pricing system (Bashirieh, 2004).

The second wave of crisis was occurred between World War I and World War II and all-encompassing support by state from Bourgeoisie society and their destroying economic outcomes

after these wars (Nornam, 2001). On this basis, states have to interfere in market system without scattering the rules of game in order to mediate this system and to improve its efficiency and to reduce poverty and unemployment in the benefit of social experiences. Afterwards, states intervene especially in labor and social welfare by approving regulations to redistribute resources for all people. Overall, such thinking inspires a type of planned and managerial capitalism (Vincent, 2007). Therefore, welfare state plans to create opportunity for all people and to redefine the role of liberal state in the society. This redefinition on state which according to some authors made liberal state closer to socialist states (Rahmatollahi, 2009) allowed state to intervene in all economic, social and political sections and attempt to remove created difficulties and barriers against liberalism.

- **Superior Interest**

Some believe that as in political problems, we prefer the vote of majority over minority. We should use public vote and prefer the votes of majority in order to have a stable and unchanged measure in interest balance. However, it should be noted that it is a deficit argument since if in elections like presidential ones, votes of majority are superior to votes of minority, and it is on this basis that no other rules exist for election. However, one should not conclude that in interest sharing, a democratic should be considered. Since interest computation is not numerical, rather it is an ethical one (Katuzian, 2007). On this basis, one may decide in which minority is superior to majority.

Superior interest is seen as the final thoughts of liberalism political philosophy introduced by John Rawls as a famous liberal writer. In his influential book “justice as fairness”, he writes that existing inequalities and discrepancies in the society should be organized in a manner that led into the benefit of the most deprived individuals. According to him, social and economic inequalities are plausible by two conditions: first, such inequalities are allocated to positions under which all individuals all provided with equal opportunities. To create conditions for fair equality, he use mechanisms like veil of ignorance so that wise people as the representatives of the society, beyond the veil of ignorance, pay attention to social and psychological outcomes of different categorizations and different social gifts and when concur with justice, their consider the fundamental rights of their clients (citizens). Second, such inequalities should have the most profit for the most deprived people (Rawls, 2009).

However, such methods of interest share are not ultimate aim of John Rawls; rather, it is advice to achieve a great ideal. By using superior interest tool, we plan to build a society where the opportunities for equal growth and fair/rational chances are respected for all members since the beginning.

- **Return to Market Discipline and Welfare State Dawn**

Economic depression in 1970s and its problems and difficulties caused criticism against state welfare. As the result of such crises, labor rebels were restarted and state’s failure in executing welfare policies would gradually yield to state’s intervention reduction in economic and social affairs (Rahmatollahi, 2009). In fact, many left groups believes that despite of its campaigns on full employment, welfare state has an unstable structure and only serves distinguished groups of the society since structural necessities have led it to this path (Khaleghparast, 2009).

Hayek who can be considered as a serious critic of John Rawls strongly disagreed with changing the state to a charity. According to him, market spontaneous discipline acts so that it would be finally in the benefit of public so that any intervention in this discipline would cause interference and damages to social deprived sections (Hayek, 2001). In addition to Hike, Nazic rejects state’s intervention in interests redistribution and intervention in economic discipline and asserts that any human is the ultimate aim and should be respected and he cannot be used for other goals (public interest purvey) (Movahed, 2005).

3. PUBLIC INTEREST THEORY IN IRANIAN CONSTITUTION LAW

Iranian Constitution Law is not strange with such terms as “expediency” and “interest” and this term is used in principles 28, 40, 45, 56, 67 and 78 as well as paragraphs 1 and 10 of principles 110, 112, 165, 175 and 176 without delineating their scope. According to some jurists, such generosity can be abused (Hashemi, 2004). Considering the foundations of the Constitution can be useful.

- **Expediency as System Expediency or Public Interest**

According to five expediencies of religion, soul, wisdom, generation and asset, some assert that if we accept these five items are the main and radical expediencies of individuals and society, then one should have no doubt that a system which protects such expediencies is itself one of these expediencies and even as the top one; in this way, ignoring such expediency may scatter other social individual and collective expediencies and even may cause that Islam becomes empty of brain and meaning (Meybodi, 2008). On this basis, Islamic system which tasks to protect these five expediencies will be in the top.

On the other hand, it is thought that establishing government means an absolute *Velayat* (sovereignty) assigned by the Divinity to the Prophet. Absolute *Velayat* of *Faghih* (Islamic jurisprudent) is a branch of absolute *Velayat* by the Prophet (PBUH). On this basis, establishing government is considered as the initial verdicts of Islam and prior to all side verdicts. Under such circumstances, system expediency is prior to all individual and collective expediencies and if interfered with other Islamic verdicts (like praying and fasting), it would stop them (Mosavi Khomeini, 1991).

Thus, one can say that in Iranian current legal system, expediency is closer than every other thing to the system expediency and when it is conflicted by individual and collective expediencies and even with initial Islamic verdicts, the expediency of the system is prior to them.

- **Governmental Order and Measuring the Expediency**

According to *Shi'a* jurisprudence, order is the rule issued by Allah to organize and adjust human life. It has different species. For instance functional and situational orders or nominal and real orders are well – known jurisprudential categorizations. However, one of the most important categorizations is to separate primary from secondary and governmental orders. Primary orders refer to fixed decrees issued by Holy Legislator by considering real expediencies and corruptions in normal conditions namely without considering exceptional circumstances. According to verse 173 of *Baghara* Chapter of Holy Quran: “*he has forbidden you the dead, blood, and the flesh of swine, also that which is invoked to other than Allah. But whoever is constrained (to eat) any of these, not intending to sin or transgress, incurs no guilt. Allah is forgiving and the most merciful*”. On the other hand, there may be conditions and events by which people’s daily life is impacted and different situations are occurred so that it became impossible to perform primary orders. Therefore, the wisdom of Holy Legislator requires considering certain orders for such conditions adapted to them. Those orders issued by considering special and exceptional conditions are secondary orders. These new conditions may be emergency, damage, reluctance, system protection, distress and constriction and so on (Arasta, 2010).

However, it is not an easy task to define and expound governmental order, since there are huge disputes on the scope of governmental orders. Besides, providing a definition on governmental order depends on determining whether governmental order is in the width or the length of primary or secondary orders and is not seen as an independent title.

Some believe that governmental orders are not independent from other orders; rather, competent *Faghih* (Islamic jurisprudent) decided on a primary or secondary order after recognizing the case. In other word, in such insight, governmental order is an executive mechanism determined

by competent *Faghih* as primary or secondary upon his discretion. For instance, we mentioned the story of tobacco in Iran. Issued *fatwa* (Islamic juristic opinion) by Mirza Shirazi was not an governmental order and it was a secondary one. When Mirza observed that respecting contract between Iran and Britain would exploit Muslims by "*pacta sunt servanda*" rule (primary order), he commanded that based on "hardship and inconvenience" rule (secondary order), "*pacta sunt servanda*" rule is not executed in this contract. Therefore, do not have in the name of governmental order actually and conceptually (Makarem Shirazi, 1411).

According to the second opinion, governmental order is an independent title in the width of primary and secondary orders. This group believes that the origination of an governmental order is often "expediency" and expediency is never among well – known secondary titles (Hashemi, 2002; Taghavi, 2008). Ultimately, if governmental order is issued by necessity, then it can be represented by secondary titles. However, it is not all reality, since in most cases the origination of an governmental order is expediency rather than necessity. Expediency is higher than necessity.

According to Great Revolution Leader, principle of *Velayat Faghih* (sovereignty of Islamic jurisprudent), as reference to issue governmental orders, is a primary order whereas issued governmental orders are not primary ones. Negating being primary does not require proving being secondary (Khosropanah, 2008).

• Public Interest

In current Iranian law system, expediency is closer to system expediency with abovementioned norms and rules. Now, the question is that whether today legal norms have the capacity to accept public interest as its common meaning in the length of system expediency or not. If yes, is the discretion of such interests by leader or other entities like parliament based on principle 71 of the Constitution Law?

It is fully clear that expediency and interest are customary issues which should be identified by elites. They will make the best decision by considering societal necessities and realities. Some believe that such perception on expediency does not adapt to pragmatism and utilitarian philosophy and is in contrary to functionalism and right orientation. It seems that a government which owes itself to jurisprudence and considers religious hallmarks as a decision making element cannot act fully customary in recognizing the expediency and would decide in an unreligious context.

In contrary, some authors criticize such insight and believe that using expediency in administrative affairs by Imam Khomeini transformed *Shi'a* jurisprudence and put the religion in the width of government. In fact, accepting expediency as the most important instrument which makes jurisprudence customary immediately is another important element entered into *Shi'a* thought by Imam Khomeini. Imam asserted that keeping the system has the highest necessity. It means that one can accept any change in religious system to respect interests. However, jurisprudence leader can intervene in jurisprudence system absolutely and make it customary by national expedencies and interests (Salehpour, 1995).

Thus, it seems that in answering the first question, we are facing with two completely contradictory insights. According to authors, by aggregating both opinions one can say that expediency recognition is fully under customary concepts so that recognition of such concept needs the works by experts and elites. However, in a system which is obliged to religious norms and according principle 4 of the Constitution all parliamentary approvals should be based on religious principles, lack of conflicts customary interests recognized by experts with religion is one of the most fundamental principles for such expedencies. In fact, recognized customary interests by elites and experts should be tested in religion context and it is the specialty of jurisprudent (*Faghih*) to diagnose whether recognized interests have any difference with religious principles or not.

4. CONCLUSION

As seen, public interest theory is a challenging concept and authors lack a single insight in this regard. Some believe that public interest concept development in recent decades is more owed to its ambiguous meaning. However, despite of its contradictions, this theory is one of the main foundations in public law. Mechanisms to achieve public interest in public law have special flexibility broadly so that realizing this goal is in direct interaction with special circumstances governing current social problems. In past, it was imagined that supplying more capital for most people equaled with public interest and the state had no right to intervene. After a while, they concluded that without state's intervention, establishing any balance of interest in the society is impossible. Therefore, it seems that one should take proper decision by temporal and spatial arrangements.

In current legal system of Iran, what perceived by the orientation of Constitution especially principle 112 and considering the procedure shaped in recent years, system expediency is raised as a paradigm in Islamic system. In many cases, Faghih has issued decrees in different areas based on the same expediency and within governmental order. However, in the case that customary interests have no contradiction to religious orders, there is no barrier to resort to such expediencies.

Authors assume that each school would construe public interest theory based on its selected ideology in law philosophy and political sciences. It is perceived through Iranian Constitution Law that respecting expediency especially "system expediency" has a wide application in governance particularly upon Islamic revolution, even though customary expediencies are not so idiosyncratic.

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